Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Market Entry and Regulation	)	IB No. 95-22
of Foreign-Affiliated Entities	)	RM-8355
	)	RM-8392

REPLY COMMENTS OF FRANCE TELECOM

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SUMMARY

The record in this proceeding does not support application of an effective market access test to noncontrolling investments by non-U.S. entities in U.S. carriers. Historically, the Commission has taken the position that appropriate safeguards against discriminatory conduct by non-U.S. entities are adequate to protect U.S. interests in competition. Not one party has suggested that such safeguards have proven to be inadequate so that adoption of an effective market access test is required. Indeed, several commenting parties argue that the Commission has no jurisdiction, under Section 214 or otherwise, to apply the effective market access test to minority investments. The Commission should reject its proposal -- and the suggestions of a few parties -- that the threshold should be set at 5%, 10% or 25%.

If the Commission were to adopt an effective market access test, the unquestionable result will be uncertainty and delay in the negotiation, review and approval of non-U.S. investments in U.S. carriers. The inevitable result of the Commission's proposal would be that the threshold for application of the test will effectively become a ceiling on non-U.S. investment, an anti-competitive, anti-consumer result that would thwart the Commission's goals.

Virtually all of the commenting parties believe that non-equity "co-marketing" alliances should not be exempted from Commission scrutiny. There is no rational basis on which such arrangements could be distinguished from equity investments. Moreover, if such arrangements are not accorded regulatory parity with

equity investments, adoption by the Commission of its proposal would have decidedly anticompetitive consequences, with only AT&T and MCI providing global services through global alliances.

The Commission should not require a U.S. service provider that is affiliated with a non-U.S. carrier to file all accounting rates that its non-U.S. carrier affiliate negotiates and maintains with all other countries. Such data are unlikely to enable the Commission to determine whether accounting rates between two other countries are cost-based or nondiscriminatory. Finally, it is questionable whether the FCC has jurisdiction to require disclosure of commercially negotiated rates between two non-U.S. carriers, or whether it would be prudent for it to do so.

FT agrees with many of the commenting parties that the Commission's Section 310(b)(4) inquiry should be modified in favor of permitting foreign ownership unless the public interest requires otherwise. FT notes that a more liberal application of Section 310(b)(4) could benefit U.S. service providers in many countries.

Finally, FT urges the Commission to reject the suggestion made by the Motion Picture Association of America, Inc. that foreign constraints in the video and audio programming sector should be considered by the FCC in assessing the public interest under both Sections 214 and 310(b)(4).

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France Télécom ("FT"), by its attorneys, respectfully replies to the comments filed in response to the Notice of Proposed Rulemaking ("Notice"), FCC 95-53, released February 17, 1995 in the above-referenced proceeding.

I. NONCONTROLLING INVESTMENTS SHOULD NOT BE SUBJECT TO A MARKET ACCESS TEST.

The comments filed in this proceeding overwhelmingly establish that application of the effective market access test -- at least to noncontrolling investments -- would, at best, be ineffective and, in all likelihood, counterproductive. Many, if not most, of the commenting parties agree there is little doubt that the test, if applied to noncontrolling minority investments, would create uncertainty for non-U.S. investors and U.S. service providers, constrain -- for no good reason -- U.S. service providers' access to capital, and erect -- not remove -- substantial barriers to competition in international services. The comments forcefully establish that an effective market access test would not advance the goals of the Commission to

(i) promote competition in global services, (ii) prevent anticompetitive conduct in the provision of international services and facilities, and (iii) encourage foreign governments to open their communications markets. Various commenting parties note, moreover, that the FCC has no legal basis for conditioning the acquisition of a minority investment in a carrier holding a Section 214 authorization.[1] Given such legal uncertainty, and because the means the Commission proposes are unlikely to achieve its objectives, the Commission should reconsider, and reject, its proposal. Alternatively, it should limit application of the effective market access test to controlling investments by non-U.S. carriers in Section 214 carriers.

A. There Is No Justification for Application of a Market Access Test to Noncontrolling Investments.

As the comments make clear, the Commission consistently has found that a noncontrolling minority investment by a non-U.S. carrier does not constitute entry into the U.S. market. There is no factual or legal evidence in the record to demonstrate why the Commission should depart from this long-established precedent. Now, the Commission appears to conclude that it is "inappropriate" to use control as

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1. See, e.g., Deutsche Telekom Comments, at 5 (a noncontrolling investment in a U.S. carrier holding a Section 214 authorization is not "acquisition" or "operation" of a line), Sprint Comments, at 7-11. In its opening comments, FT made a similar point, noting that "adoption of a threshold lower than control for application of the effective market entry standard may well confuse Section 214 jurisprudence" because it would, for the first time, require Commission authorization for transfer of noncontrolling interests (albeit only to non-U.S. entities) in Section 214 authorized carriers. See FT Comments, at 5-6 and n.3.

a threshold for application of an entry standard because even a less-than-controlling ownership interest in a U.S. carrier "may confer on the foreign carrier the incentive to discriminate."[2] However, neither the Notice, nor any of the comments filed in response, explains why "linking facilities-based entry to effective market access is the surest means of preventing anticompetitive conduct by a foreign carrier."[3] The Commission's conclusions that safeguards against discrimination, such as the requirements imposed by the FCC on MCI in the context of the BT-MCI transaction,[4] would be adequate to detect and prevent discrimination remain valid and uncontroverted. Moreover, there is no evidence that U.S. providers are or would be willing to risk sanctions by the Commission for being the beneficiaries of discrimination by foreign minority investors, discrimination that would violate conditions attached to Section 214 authorizations.

The Commission has expressly found that, absent control, a non-U.S. carrier would not be in a position to direct the actions of the U.S. carrier, and the U.S. carrier would be unlikely to risk FCC sanctions for participating in illegal discriminatory conduct.[5] The Commission also observed that U.S. carriers are

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2. Notice, at ¶ 56.

3. Notice, at ¶ 47.

4. BT/MCI, 9 FCC Rcd 3960, 3965 (1994); see Telefónica Larga Distancia de Puerto Rico, 8 FCC Rcd 106, 108-9 (1992).

5. See Regulation of International Common Carrier Services, 7 FCC Rcd 7331, 7332 (1992).

subject to ongoing reporting requirements designed to detect discrimination by non-U.S. carriers or administrations in favor of specific U.S. carriers.[6] There is no evidence, experience or data to support the turnabout in regulatory direction that the Commission's effective market access proposal, if adopted, would represent.

The principal proponent of the Commission's proposal -- AT&T -- relies merely on inference and supposition. For several pages, AT&T strains to elaborate a parade of horribles that is "limited only by [its own] imagination."[7] In so doing, AT&T essentially repeats the same hypothetical "injuries" that it conjured up to inveigh against the Sprint petition for declaratory ruling.[8] Neither AT&T nor any other commenting party provides any facts or other evidence that a noncontrolling foreign investor has acted, or would act, in any one of the myriad ways in which AT&T claims a carrier "can undermine competition" or "could favor" a U.S. affiliate.[9]

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6. Id.

7. AT&T Comments, at 10-16.

8. See In the Matter of Sprint Corporation, Petition for Declaratory Ruling Concerning Sections 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1924, as amended, File No. ISP-95-002 (filed Oct. 14, 1994). Indeed, the strong similarity between AT&T's comments in this proceeding and its opposition to the grant of the Sprint declaratory ruling reveal all too clearly that AT&T's principal motivation is to stop competition from a third global alliance, not to promote competition in the global marketplace.

9. AT&T Comments, at 10, 12.

Conspicuously absent from the comments of any party that proposes a threshold other than actual control is any justification for such a proposal.[10] AT&T, without more, cites three areas in which a 10% "threshold" has been applied and implies that this somehow establishes the appropriateness of imposing a 10% threshold here.[11] The first two of these -- generic waiver under the MFJ for up to 10% RBOC investment in international facilities and a 10% trigger for holders of securities to file with the SEC -- simply parrot the examples cited by the Commission.[12] The third -- which looks to exemptions under the Hart-Scott-Rodino Act -- seems no more directly on point.[13]

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10. To the extent that there is any intimation in the FCC's Notice, or in the comments, that a 5% threshold would be appropriate because it is a percentage used in the FCC's cross- and multiple-ownership rules, it should be soundly rejected by the Commission. The purpose of the FCC's cross- and multiple-ownership rules are to encourage diversity and to discourage, if not prohibit, control by one company over another that would thwart important public policy objectives. By contrast, the FCC, in this proceeding and elsewhere, is on record as encouraging investment in and competition among telecommunications providers. Indeed, a number of commenting parties point out that foreign capital would be regarded as especially welcome by smaller players.

11. AT&T Comments, at 25-26.

12. Notice, at ¶ 59.

13. Presumably, AT&T is not arguing for the converse, and perhaps more sensible, proposition: that approval of an interest in a U.S. carrier by the antitrust authorities under the Hart-Scott-Rodino Act would obviate the need for further review by the Commission.

MCI simply makes the unsupported assertion that an ownership level greater than 10% would "give a foreign carrier the incentive to discriminate and otherwise engage in anticompetitive conduct favoring its affiliated U.S. carrier."[14] Similarly, BT North America's suggestion that the test should apply to proposed investments of 10% or more because "[i]t is reasonable to presume an incentive to discriminate under those circumstances" is not undergirded by any explanation as to why such a presumption is reasonable.[15]

Tellingly, none of the commenting parties explains why an effective market access test should apply where there are appropriate safeguards against discriminatory conduct. The Department of Justice concluded in the Competitive Impact Statement filed in connection with its review of BT's acquisition of a 20% interest in MCI that BT, by reason of that investment, had an incentive to discriminate in favor of MCI.[16] Is it not logical, therefore, to assume that a 10% investment by a non-U.S. carrier would constitute only half as much an incentive to discriminate as BT had and has to favor MCI? Furthermore, the conditions imposed on MCI by the FCC in connection with that investment were judged sufficient to address concerns with respect to discrimination -- without application of an effective

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14. MCI Comments, at 11.

15. BT North America Comments, at 8.

16. See United States v. MCI Communications Corp. and BT Forty-Eight Co., 59 Fed. Reg. 33,009 (1994).

market access test. It would seem appropriate, therefore, not to require application of an effective market access test if like conditions were imposed on a carrier in which a non-U.S. company was acquiring a mere 10%.

The comments of Deutsche Telekom AG ("DT") persuasively refute the notion that a noncontrolling equity interest in a U.S. carrier -- let alone a mere 10% stake -- will create a sufficient incentive for the foreign carrier to discriminate.[17] DT cogently demonstrates that an improper 5% shift in traffic to Sprint would reap DT an unimpressive additional profit of only $250,000.[18] As DT points out, this would not be worth the risk of the loss of goodwill and the cost of defending administrative or legal actions. Moreover, if the safeguards of BT-MCI were applied, Sprint would be under an enforceable obligation not to accept more than its share of return traffic. In that case, Sprint and its shareholders are unlikely to want or be grateful for the additional traffic, given the likelihood of competitor complaints and Commission action.

DT's figures also illustrate why it makes no sense to aggregate the investments of more than one non-U.S. carrier when determining whether the investment threshold has been reached. Assuming that DT and FT each own 10% of Sprint, each carrier's incentive to discriminate -- assuming such incentive -- cannot be

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17. Deutsche Telekom Comments, at 55.

18. This is the shift hypothesized by AT&T in opposing the Sprint petition for declaratory ruling. See Opposition of AT&T Corp., File No. ISP-95-002, at 35.

greater than its own stake in Sprint. Using the example above, DT's additional profit would still be a mere $250,000. Accordingly, there is simply no support for MCI's bald assertion that the Sprint/DT/FT transaction is "an example of the threat posed by precisely this risk [of anticompetitive harm] when more than one foreign carrier proposes to acquire more than a 10 percent interest in a U.S. carrier, but where each foreign carrier individually would own less than ten percent."[19]

To summarize, the comments underscore a point made in FT's opening comments: a threshold of 10%, 20%, 25%, or any level short of control will necessarily be arbitrary and will have the effect of undermining the Commission's goals in this proceeding. As the comments dramatically illustrate, the real losers will be U.S. carriers seeking access to non-U.S. capital, and U.S. and non-U.S. consumers who want greater competition and choice.

If the FCC decides that it has the legal authority to adopt its effective market access test -- an assumption which several commenting seriously question -- the trigger should be actual control by a non-U.S. carrier. For substantial noncontrolling minority investments, the Commission should adopt uniform nondiscrimination safeguards.

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19. MCI Comments, at 12 n.10.

B. Uncertainty and Delay Resulting from Applying the Effective Market Access Test to Noncontrolling Investments Will Inhibit Investment in U.S. Service Providers and Stifle Competition.

The comments reflect little support for the Commission's view that a "formal rulemaking . . . would give foreign entities more certainty when making investment decisions, and provide an incentive for foreign administrations with currently closed markets to consider opening their markets."[20] To the contrary, most of the commenting parties agree that a formal rulemaking adopting an effective market access test will inhibit and delay foreign carrier investment in U.S. service providers. U.S. service providers that are already active in the market for global services -- such as AT&T -- would be only too happy to have their competitors wait while the Commission, in consultation and coordination with Executive Branch agencies, conducts a detailed examination into whether one or another telecommunications market offers effective market access. It is only reasonable to expect that parties that have already secured a favorable ruling will do all they can to delay potential competitors from receiving theirs. It is not unreasonable to expect that competitors will interpose any argument they can muster to delay Commission approval of a transaction.[21]

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20. Notice, at ¶ 26.

21. In response to Sprint's Petition for Declaratory Ruling, for example, AT&T proposed a model for an ideal competitive market that could not be met by any country -- even the United States. See Opposition of AT&T Corp., File No. ISP-95-002, at 14-15.

If there is any uncertainty that an investment would pass the effective market access test, there will be substantial disincentives for investors and U.S. carriers to engage in the arduous and lengthy negotiations that typically are required to hammer out the details of such an investment. In the absence of a list of approved countries or some other type of "preclearance" mechanism, how will investors know that their home markets will be deemed sufficiently open so that the investment can go forward?[22] Delay and uncertainty undermine, not promote, investment and broad-gauged business ventures. Applying an effective market access test to a minority investment will, therefore, result in less -- not more -- competition.

In this regard, the comments of the National Telecommunications and Information Administration ("NTIA") are of particular interest. NTIA, speaking on behalf of the Administration, emphasizes that an effective market access test could not be applied by the Commission without the involvement of other agencies of the Executive Branch. Because the FCC must accord great deference to the Executive Branch in applying an effective market access test, and consultative and cooperative procedures must be worked out to obtain inter-agency approval for an investment, experience suggests that it will be difficult for the Commission to move expeditiously.

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22. The mechanism proposed by the Notice [¶ 51], which contemplates the filing of a notice under Section 63.11 of the Commission's Rules, would inhibit investment because of the possibility that the Commission might designate the U.S. carrier's Section 214 certificate for hearing. (This presupposes, of course, that the Commission has jurisdiction to designate Section 214 certificates for hearing -- a notion convincingly challenged by several commenters, including Sprint.)

As a practical matter, any such delay and uncertainty will transform the effective market access test into a de facto ceiling, which will cap the amount of non-U.S. carrier investment in U.S. service providers. Despite the attractiveness of the U.S. telecommunications market, no rational investor will bother to negotiate the necessary business hurdles unless it is worth its while, which will be the case for only the largest of investments by the most patient of non-U.S. investors. In the real world, non-U.S. investors will, in large measure, simply reduce or avoid their investment in U.S. service providers, to the detriment of U.S. consumers.

C. Any Effective Market Access Test Should Be Applied Equally to Co-Marketing Arrangements.

Essentially all comments (other than those of AT&T) are in harmony with FT's views that, if the Commission were to adopt an effective market access test, co-marketing arrangements should be subject to the same review as direct investments. In this regard, the comments almost uniformly reject the Commission's tentative conclusion that no scrutiny of such arrangements is required.[23] Even AT&T's comments provide no support for the assumption that incentives to discriminate are somehow lessened where a global alliance is operating through a "co-marketing" arrangement. To the contrary, the comments highlight that the sole beneficiary of a rule exempting co-marketing arrangements from entry regulations and

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23. Notice, at ¶ 62 (footnote omitted). As FT noted in its initial comments, it is unclear why nonexclusivity would distinguish a co-marketing arrangement from a joint venture coupled with a non-U.S. carrier's investment in a U.S. service provider. See FT Comments at 12 & n. 7.

nondiscrimination safeguards would be AT&T, because other U.S. carriers -- even MCI -- are unlikely to have the financial wherewithal, international presence or technological prowess to enter into global alliances without such investment.[24]

II. REQUIRING DISCLOSURE OF NON-U.S. ACCOUNTING RATES WOULD BE INEFFECTIVE AND IS LIKELY TO BE CONSIDERED BY FOREIGN GOVERNMENTS AS OVERLY INTRUSIVE.

The FCC has proposed to require a facilities-based U.S. service provider that is deemed affiliated with a non-U.S. carrier by reason of investment to file a list of the accounting rates that the affiliated non-U.S. carrier maintains with all other countries to ensure that such rates are cost-based, nondiscriminatory and transparent.[25] Various parties other than FT, including the British Government, Cable & Wireless and TLD, criticized this proposal.

Most commenting parties agreed that accounting rates should be reduced over time and be more cost-oriented. Nonetheless, a requirement to file accounting rates for inter-carrier relations that do not touch the United States is, as FT has noted, not likely to be very useful.[26] As the British Government cogently points out, the Commission's proposal also raises serious concerns. What is the basis on which judgments would be made as to whether accounting rates are or are not

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24. See, e.g., LDDS Comments, MFS International, Inc. Comments and NYNEX Comments.

25. Notice, at ¶ 87.

26. FT Comments, at 25-26.

cost-based, even if the Commission (or AT&T) has such accounting rate information? It will be quite difficult for the Commission to determine whether any disparities between (i) the accounting rate for the relationship between the U.S. service provider and its affiliated non-U.S. carrier and (ii) the accounting rate between the two non-U.S. carriers are justified (or not) on the basis of cost, or for some other reason.

The British Government and the other parties critical of the proposal note that the Commission's proposal raises issues of comity and sovereignty. On what basis can and should the FCC require an enterprise that is outside the United States to reveal commercially confidential information negotiated with a third entity that may have no nexus to the United States? Even if such disclosure would allow the Commission to "determine whether there is a noncost-based disparity between the rates maintained by that carrier with U.S. carriers and the rates it maintains with its other foreign correspondents,"[27] FT respectfully suggests that the rates a non-U.S. carrier maintains with another non-U.S. carrier are simply outside the Commission's jurisdiction.[28] Accordingly, FT does not believe that the record could support

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27. Notice, at ¶ 88.

28. See 47 U.S.C. § 152(a) (1994) (Communications Act applies to foreign communication which originates and/or is received within the United States); cf. United States v. Western Electric, 1990 U.S. Dist. LEXIS 10371 (D.D.C.) at 11 ("[T]he existence of the consent decree does not give this Court jurisdiction to foster competition in the international telecommunications market in general, or to promote equal access to or within the New Zealand interexchange market").

adoption by the Commission of the proposal that all such accounting rates be disclosed.

III. THE COMMISSION SHOULD ADOPT A MORE LIBERAL CONSTRUCTION OF SECTION 310(b)(4).

FT agrees with the comments of parties urging a more liberal construction by the Commission of Section 310(b)(4). FT believes that foreign investment greater than 25% should be presumed to be in the public interest unless the Commission concludes otherwise.[29]

Such an approach would benefit U.S. investors seeking to invest in wireless providers abroad. In France, for example, no more than 20% of the equity of an enterprise providing wireless services to the public can ordinarily be held by entities that are not established in the European Union. That statutory ceiling may be raised or removed, however, by the French regulator, the Direction Générale des Postes et Télécommunications ("DGPT"), based on reciprocal treatment in the non-EU home market of the investor. A decision to raise or remove that ceiling in the case of the United States would, of course, be entirely within the discretion of the DGPT. Nonetheless, FT, as noted in its initial comments, believes that a more liberal Commission approach toward the application of Section 310(b)(4) would

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29. See, e.g., British Government Comments, at ¶ 16, Deutsche Telekom AG Comments, at 8-9; and Comments of J. Gregory Sidak, at 2-4.

promote an even more favorable climate for U.S. investors in the French telecommunications sector.

IV. CONTENT-BASED RESTRICTIONS SHOULD NOT BE CONSIDERED IN THIS PROCEEDING.

The comments of the Motion Picture Association of America urge the FCC, when assessing the public interest under both Sections 214 and 310(b)(4), to examine market access constraints in the foreign market on content such as video and audio programming. FT respectfully suggests that such constraints are irrelevant to this proceeding.

There is simply no nexus between investments by non-U.S. telecommunications carriers in U.S. service providers and content-based restrictions imposed by some foreign governments on programming. The historic premise of common carrier regulation is that carriers have no control over and are largely indifferent to content. Indeed, in many, if not most, countries, content policies, with respect to broadcasting, cable television, or theatrical motion pictures, are established entirely apart from policies regarding the telecommunications sector.

Moreover, there is simply no basis to assume that a non-U.S. telecommunications carrier has any influence at all over the national regulator or other policy-maker having responsibility for broadcasting or cultural policies. Thus, to the extent that the FCC's effective market access test is premised on the notion (which FT disputes) that a non-U.S. carrier seeking to invest in a U.S. service provider

might be expected to pressure its regulator to liberalize its national telecommunications sector, that notion could not possibly be extended to content.

V. CONCLUSION.

Although FT fully supports the Commission's broader objectives of promoting competition in the telecommunications sector, it believes that substantial questions have been raised with respect to the legality, desirability and operation of the proposed effective market test. If such a test were adopted, it should apply only to situations in which a non-U.S. entity acquires actual control over a U.S. carrier. In lieu of such a test, the Commission should adopt and apply nondiscrimination safeguards to all noncontrolling investments or relationships, including co-marketing arrangements.

Respectfully submitted,

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